



0000097159

ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER

Chairman

JIM IRVIN

Commissioner

WILLIAM A. MUNDELL

Commissioner

JEFF HATCH-MILLER

Commissioner

MIKE GLEASON

Commissioner

Arizona Corporation Commission

DOCKETED

MAY 12 2003

DOCKETED BY

CAR

2003 MAY 12 P 4: 17

AZ CORP COMMISSION
DOCUMENT CONTROL

IN THE MATTER OF INVESTIGATION
INTO QWEST CORPORATION'S
COMPLIANCE WITH CERTAIN
WHOLESALE PRICING REQUIREMENTS
FOR UNBUNDLED NETWORK ELEMENTS
AND RESALE DISCOUNTS.

DOCKET NO. T-00000A-00-0194
PHASE II-A

**QWEST CORPORATION'S MOTION TO STRIKE PORTIONS OF THE
DIRECT TESTIMONY OF AT&T WITNESS, DOUGLAS DENNEY, AND
MOUNTAIN TELECOMMUNICATIONS WITNESS, MICHAEL LEE
HAZEL**

I. Introduction

Qwest Corporation ("Qwest") submits this motion to strike portions of the direct testimony of Douglas Denney, filed on behalf of AT&T Communications ("AT&T") and WorldCom, and portions of the direct testimony of Michael Lee Hazel, filed on behalf of Mountain Telecommunications, Inc. ("MTI"). Specifically, Qwest seeks to strike: (1) Mr. Denney's testimony on pages 5-7 that asks the Commission to set a new, modified rate for the unbundled loop; and (2) Mr. Hazel's testimony on page 6, lines 8-24, that challenges the rate Qwest is charging for multiplexing.¹ This testimony violates the terms of the stipulation that AT&T, WorldCom, and MTI entered into with the other parties on April 8, 2003, concerning the issues to be addressed in this phase of the docket and the Procedural Order of April 11, 2003

¹ In addition, Qwest requests that the Commission strike the references to "multiplexing" in Mr. Hazel's testimony that appear at page 7, line 4, and page 8, line 1.

("Procedural Order") adopting the stipulation. In addition, the testimony attempts improperly to raise an issue that AT&T/WorldCom and MTI should have raised earlier.

The stipulation and Procedural Order specifically define and limit the issues to be considered in this phase of the docket. The issues are expressly limited to determining (1) which of Staff's two proposed alternatives for transport rates should be adopted; and (2) the appropriate rate for the analog switch port, including the appropriate allocation of switching costs between the port rate and usage rates. There are no other issues, as reflected by the statement in the stipulation that the parties "stipulate and agree that the Hearing Division should hold an expedited hearing on the following, *limited* issues" (emphasis added). The parties decided together to limit the proceeding to these issues after a thorough discussion and exchange that included AT&T and MTI. Limiting the proceeding to these issues was driven in substantial part by the parties' agreement that an expedited hearing is appropriate and that only a small number of issues could be addressed under an expedited schedule. The attempts of AT&T/WorldCom and MTI to introduce evidence relating to the unbundled loop and multiplexing clearly violate the parties' agreement about the issues to be addressed in this proceeding and the terms of the Procedural Order.

II. Discussion

A. The Commission Should Strike The Portions Of Mr. Denney's Testimony That Address The Rate For The Unbundled Loop.

Mr. Denney's testimony argues that because the Commission's Phase IIA order modified several of the HAI model's switching inputs, it is necessary to reduce the rate for the unbundled loop that the Commission ordered in Phase II almost a year ago. AT&T and WorldCom are raising this issue for the first time through Mr. Denney's testimony. In the discussions leading to the stipulation and the Procedural Order, no party ever suggested including this issue in this phase of the docket. AT&T's and WorldCom's attempt to insert the issue into the proceeding now violates the terms of the stipulation to which they freely and voluntarily agreed. It also is

contrary to the parties' agreement that the number of issues to include in the proceeding should be limited because of the need for expedited resolution of the switching and transport issues.

Mr. Denney's testimony also is procedurally improper because the loop-related issue it addresses could have been raised in exceptions to the Phase IIA order on switching. The alleged effect of the Phase IIA switching rulings on the HAI-produced loop rate could have been determined by AT&T and WorldCom when the ALJs and the Commission issued their switching rulings in Phase IIA. Accordingly, if AT&T and WorldCom believed an adjustment to the loop rate was necessary, they should have made that argument in exceptions to the ALJs' Recommended Opinion and Order and in applications for rehearing of the Commission's Phase IIA Opinion and Order. Having failed to do so, AT&T and WorldCom are precluded from raising the issue now.

Indeed, in opposing MTI's motion to enjoin Qwest from implementing transport rates, filed in Docket No. T-0105B-02-0871, AT&T itself argued that MTI's challenge to those rates was procedurally improper because MTI failed to invoke the exceptions and rehearing processes in this docket. AT&T explained that the right to file exceptions and seek rehearing, along with other procedural rights, "are in place to assure a party's interests are considered by the Commission in its deliberations."² MTI's request for an injunction, AT&T argued, was "based on evidence and arguments it could have made in the cost proceeding" and, therefore, was not properly before the Commission. This same standard applies to AT&T here – AT&T could have argued in exceptions and a rehearing application that the Commission's rulings relating to switching required an adjustment to the loop rate. Its failure to do so renders its current request to adjust the loop rate improper.

² AT&T's Response to MTI's Motion for Injunction at 5.

For these reasons, Qwest respectfully requests that the Commission strike the portions of Mr. Denney's direct testimony on pages 5-7 addressing the rate for the unbundled loop. If the Commission does not strike this testimony, Qwest requests that it be permitted to respond to the testimony by supplementing the rebuttal testimony of Qwest witness, Terri Million, prior to the hearing scheduled for May 28, 2003.

B. The Commission Should Strike The Portions Of Mr. Hazel's Testimony Relating To Multiplexing.

There also was no discussion among the parties to the stipulation about including any issues relating to multiplexing in this phase of the docket. Accordingly, the Procedural Order does not list multiplexing as one of the issues to be addressed in this phase. Indeed, the rate for multiplexing is one of the issues that the parties to the cost docket resolved among themselves in response to the Commission's urging that the parties attempt to resolve as many issues as possible. MTI could have intervened in the prior phases of the cost docket and presented its position on multiplexing during the parties' discussion of that issue. Having chosen not to participate, MTI should not be permitted now to assert belatedly that the multiplexing rate is improper.

Mr. Hazel's testimony relating to multiplexing should, therefore, be stricken. If the Commission does not strike this testimony, Qwest requests that it be permitted to respond further to the testimony by supplementing the rebuttal testimony of Qwest witness, Terri Million, prior to the hearing scheduled for May 28, 2003.

///

///

///

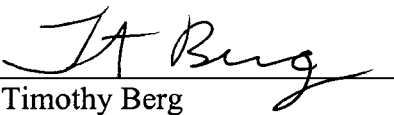
///

III. Conclusion

For the reasons stated, the Commission should strike the portions of Mr. Denney's testimony and Mr. Hazel's testimony identified above.

Respectfully submitted,

Qwest Corporation

By: 
Timothy Berg
Theresa Dwyer
FENNEMORE CRAIG
3003 North Central, Suite 2600
Phoenix, Arizona 85012

John M. Devaney
PERKINS COIE LLP
607 Fourteenth Street, N.W.
Suite 800
Washington, D.C. 20005-2011
(202) 628-6600
(202) 434-1690 (facsimile)

Attorneys for Qwest Corporation

ORIGINAL and 13 copies of the
foregoing hand-delivered for
filing this 12th day of May, 2003 to:

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

COPY of the foregoing hand-delivered
this 12th day of May, 2003 to:

Maureen Scott
Legal Division
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

Christopher Kempley
Legal Division
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

Dwight D. Nodes
Hearing Division
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

Lyn Farmer
Hearing Division
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

Ernest Johnson
Utilities Division
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

COPY of the foregoing mailed
this 12th day of May, 2003 to:

Steven J. Duffy
RIDGE & ISAACSON, P.C.
3101 North Central Avenue, Ste. 1090
Phoenix, Arizona 85012-2638

Richard S. Wolters
M. Singer-Nelson
AT&T
1875 Lawrence Street, Room 1575
Denver, CO 80202-1847

Michael W. Patten
ROSHKA HEYMAN & DEWULF
400 E. Van Buren Street, Suite 800
Phoenix, AZ 85004

Michael Grant
Todd C. Wiley
GALLAGHER & KENNEDY
2575 E. Camelback Rd.
Phoenix, AZ 85016-9225

Thomas H. Campbell
LEWIS & ROCA
40 N. Central Avenue
Phoenix, AZ 85007

Brian S. Thomas
TIME WARNER TELECOM
520 SW Sixth Ave., Suite 300
Portland, OR 97204-1522

Thomas F. Dixon
WORLD COM
707 17th Street
Denver, CO 80202

Eric S. Heath
SPRINT COMMUNICATIONS CO.
100 Spear Street, Suite 930
San Francisco, CA 94105

Scott S. Wakefield
RUCO
1110 West Washington, Suite 220
Phoenix, AZ 85007

Ray Heyman
ROSHKA HEYMAN & DeWULF
400 E. Van Buren Street, Suite 800
Phoenix, AZ 85004

Rex M. Knowles
XO Communications, Inc.
111 E. Broadway, Suite 1000
Salt Lake City, UT 84111

Harry Pliskin
COVAD COMMUNICATIONS COMPANY
7901 Lowry Boulevard
Denver, Colorado 80230

Lisa Crowley
COVAD COMMUNICATIONS COMPANY
4250 Burton Drive
Santa Clara, CA 95054

Greg Kopta
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688

Mary S. Steele
DAVIS WRIGHT TREMAINE, LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688

Dennis Ahlers
Senior Attorney
ESCHELON TELECOM, INC.
730 Second Avenue South, Suite 1200
Minneapolis, MN 55402

Steve Sager, Esq.
MCLEODUSA TELECOMMUNICATIONS SERVICE, INC.
215 South State Street, 10th Floor
Salt Lake City, Utah 84111

Marti Allbright, Esq., Esq.
MPOWER COMMUNICATIONS CORPORATION
5711 South Benton Circle
Littleton, CO 80123

Penny Bewick
NEW EDGE NETWORKS
PO Box 5159
3000 Columbia House Blvd.
Vancouver, Washington 98668

Michael B. Hazzard
KELLEY DRYE AND WARREN
1200 19th Street, NW
Washington, DC 20036

Janet Livengood
Z-TEL COMMUNICATIONS, INC.
601 South Harbour Island
Suite 220
Tampa, Florida 33602

Andrea Harris
ALLEGIANCE TELECOM
2101 Webster
Suite 1580
Oakland, CA 94612

Traci Grundon
DAVIS, WRIGHT TREMAINE, LLP
1300 S. W. Fifth Avenue
Portland, OR 97201

Joan Burke
OSBORN MALEDON
2929 N. Central Avenue
Phoenix, AZ 85012

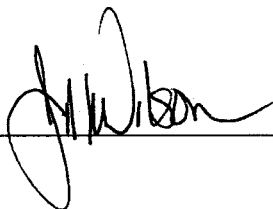
Jacqueline Manogian
MOUNTAIN TELECOMMUNICATIONS, INC.
1430 W. Broadway Road, Suite A200
Tempe, AZ 85282

Darren S. Weingard
Stephen H. Kukta
SPRINT COMMUNICATIONS CO
1850 Gateway Drive, 7th Floor
San Mateo, CA 94404-2467

Jeffrey W. Crockett
Jeffrey B. Guldner
SNELL & WILMER
One Arizona Center
Phoenix, AZ 85004-2202

Joyce B. Hundley
United States Department of Justice
Antitrust Division
City Center Building
1401 H. Street, NW, Suite 8000
Washington, DC 20530

Kimberly M. Kirby
DAVIS DIXON KIRBY LLP
19200 Von Karman Avenue
Suite 600
Irvine, CA 82612

A handwritten signature in black ink, appearing to read 'Kim Kirby', is written over a horizontal line.

PHX/1419637.1/67817.240